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Nos. 02-10038 & 02-11309

In the Supreme Court of the United States

ROBERT JAMES TENNARD,
ROBERT SMITH,

Petitioners,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL MENTAL HEALTH ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL MENTAL HEALTH ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The National Mental Health Association ("NMHA") is a nonprofit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. With 340 affiliates in 43 states and the District of Columbia, NMHA has worked toward eliminating discrimination against and public misconceptions about people with mental disabilities since 1909. NMHA believes that mental disabilities can influence an individual's mental state at the time he or she commits a crime. NMHA also believes mental disabilities should be taken into account as a mitigating factor during all phases of a potential death penalty case.

SUMMARY OF ARGUMENT

Petitioners Robert Smith and Robert Tennard are part of a small but important group of capital defendants that has been "left in an eddy, missing the tide in both directions." *Robertson v. Cockrell*, 325 F.3d 243, 259 (5th Cir.) (*en banc*) (Higginbotham, J., concurring), *cert. denied*, 124 S. Ct. 28 (2003). These defendants have mitigating evidence of mental disabilities that must be considered, but their evidence does not rise to the level of mental retardation or insanity that would bar their executions entirely under *Atkins v. Virginia*,

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[1] The parties' written consent to the filing of this brief is being filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

536 U.S. 304 (2002), or *Ford v. Wainwright*, 477 U.S. 399 (1986). In addition, because these defendants were sentenced prior to Texas' 1991 statutory change, their juries were not given a separate question as a vehicle for considering this mitigating evidence, though some were given the "nullification" instruction this Court later struck down in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"). As to this group, Fifth Circuit precedent confines *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), to its facts, refusing to require a separate mitigation question unless the evidence meets a strict threshold test of "constitutional relevance."

This Court should reject the Fifth Circuit's restrictive approach for two reasons. First, the Fifth Circuit's threshold test dismisses a sizeable category of mental disability evidence even though that evidence cannot be given full effect under the pre-1991 Texas capital sentencing instructions. Second, the Fifth Circuit test suffers from several constitutional flaws. It prevents the jury from giving effect to all the mitigating evidence, injects an impermissible harmless error inquiry, usurps the jury's individualized sentencing determination, and deviates from the modern trend among the States (including Texas) of asking a separate mitigating evidence question in all capital cases. Rather than adopting this flawed test, this Court should adhere to its analysis in *Penry I*, hold that Petitioners' juries could not give effect to their mental disability evidence, and reverse and remand these cases for new sentencing hearings.

ARGUMENT

To determine whether a capital murder defendant is entitled to a separate mitigating evidence question at sentencing, the Fifth Circuit first considers whether the defendant presented "*constitutionally relevant* mitigating evidence." *Smith v. Cockrell*, 311 F.3d 661, 679-680 (5th Cir. 2002) (emphasis added), *cert. granted in part sub nom.*

Smith v. Dretke, 124 S. Ct. 46 (2003). This test has two parts, and Petitioners challenge both in this Court.

First, the defendant's evidence must show a "uniquely severe permanent handicap[] with which [he] was burdened through no fault of his own." *Id.* at 680 (quoting *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995)). Second, the evidence must show a causal "nexus" between this handicap and the defendant's crime. *Id.* at 680-81; *see also Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002), *cert. granted sub nom. Tennard v. Dretke*, 124 S. Ct. 383 (2003) (must show criminal act "was attributable" to handicap). Only if both prongs of this threshold test are met will the Fifth Circuit conduct the inquiry mandated by this Court in *Penry I*: whether the jury could fully consider and give effect to the defendant's mitigating evidence under the existing Texas instructions. 492 U.S. at 320-22; *see Smith*, 311 F.3d at 680 (whether evidence is "beyond the 'effective reach' of the jurors" (citation omitted)).

The restrictions imposed by the Fifth Circuit's threshold test are in conflict with a long history of this Court's jurisprudence aimed at ensuring that jurors have an opportunity to consider and give effect to *all* mitigating evidence. Under this Court's cases, a jury generally will need a separate mitigating evidence question to enable it to give effect to mental disability evidence.

I. EVIDENCE OF MENTAL DISABILITIES AND THEIR CAUSES GENERALLY REQUIRES A SEPARATE MITIGATING EVIDENCE QUESTION.

A. Mental Disability Evidence, Like All Mitigating Evidence, is Constitutionally Relevant.

The pillar of this Court's approach to the role of mitigating evidence in the punishment phase of a capital murder trial is that "a sentencer may not be precluded from considering, and may not refuse to consider, any relevant

mitigating evidence." *Penry I*, 492 U.S. at 318. When this Court upheld the constitutionality of the pre-1991 Texas capital sentencing scheme in *Jurek v. Texas*, 428 U.S. 262, 276 (1976), the plurality held that a sentencing jury "must be allowed to consider on the basis of all relevant evidence not only why a death penalty should be imposed, but also why it should not be imposed." *Id.* at 271. Among that "relevant evidence" is "*whatever* evidence of mitigating circumstances the defense can bring before it." *Id.* at 273 (emphasis added).

Two years later in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court explained that relevant mitigating evidence includes "*any aspect* of the defendant's character or record *and* any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (plurality opinion) (emphasis added). Beginning with *Lockett*, this Court has reversed death sentences repeatedly when the sentencer was either unable or unwilling to consider any mitigating evidence that fell within this broad definition. *E.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 439-443 (1990); *Penry I*, 492 U.S. at 318; *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett*, 438 U.S. at 608-09.

None of these decisions has required a defendant to make a heightened threshold showing that his mitigating evidence is "constitutionally relevant." Rather, *McKoy* confirms that "[t]he meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other evidentiary context. 494 U.S. at 440. Thus, "to be relevant to an inquiry, [mitigating evidence] need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* (citations omitted).

The theory underlying this broad definition of mitigating evidence is "that punishment should be directly related to the personal culpability of the criminal defendant." *Penry I*, 492 U.S. at 319. Applying these principles, this Court already has determined that mental disability evidence – including evidence of low intelligence or mental illness, as well as a history of childhood abuse contributing to these conditions – is relevant to the defendant's personal moral culpability and must be considered by the jury. *McKoy*, 494 U.S. at 436-37 (low I.Q.); *Penry I*, 492 U.S. at 322-23 (retardation and abuse); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emotional and mental problems or disadvantaged background); *Eddings*, 455 U.S. at 113 (personality disorder and abuse); *Bell v. Ohio*, 438 U.S. 637, 641 (1978) (mental deficiency); *see also Wiggins v. Smith*, 123 S. Ct. 2527, 2536, 2542 (2003) (relevance of low I.Q. and abuse). Furthermore, studies show that in practice, jurors intuitively grasp the moral relevance of mental disability evidence to a defendant's personal culpability.[2]

One reason mental disabilities are relevant to culpability is that they can affect a defendant's ability to understand and process information, engage in logical reasoning, abstract from mistakes and learn from experience, control impulses, or evaluate the consequences of conduct. *Atkins*, 536 U.S. at 318; *Penry I*, 492 U.S. at 322. This reason holds true not

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[2] *See, e.g.*, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539, 1564-65 (1998) (jurors "attach significant mitigating potential to facts and circumstances that show diminished mental capacity," such as mental retardation, extreme emotional or mental disturbance at the time of the offense, or a history of mental illness, and express concern for "defendants who have been seriously abused as children"); Kevin Howells et al., *Social Evaluations of Mental Illness (Schizophrenia) in Relation to Criminal Behaviour*, 22 BRITISH J. SOC. PSYCHOL. 165 (1983) (finding that survey subjects perceive mentally ill offender as less responsible, blameworthy, and deserving of punishment).

only for mental retardation, but also for many other mental disabilities and for childhood abuse.[3] In addition, the crime-deterring objective of the death penalty is less served by executing the mentally disabled, who often cannot fully assess potential outcomes from different courses of action, and who may not even comprehend the nature of the punishment they face.[4] Nothing more is required to demonstrate the "constitutional relevance" of mental disability evidence.

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[3] *E.g.*, Donald Lynam et al., *Explaining the Relation Between IQ and Delinqvency*, 102 J. ABNORMAL PSYCHOL. 187 (1993) (low I.Q. points to deficits in ability to monitor and control behavior, including sustaining attention, reasoning abstractly, forming goals, anticipating and planning, and considering future implications of acts); Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. Rev. 1143, 1165 (1999) (childhood abuse can cause developmental, psychological, or neurological damage in ways that affect perception and behavior, including impaired ability to make appropriate judgments, understand consequences of actions, and make logical choices); American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 299-300 (4th ed. text rev. 2000) (symptoms of schizophrenia and other psychotic disorders can include misinterpretation of experiences, disorganized thinking, and difficulty with socially appropriate and goal-directed behavior); *id.* at 464-65 (symptoms of posttraumatic stress disorder can include diminished responsiveness to external world, impaired affect modulation, self-destructive and impulsive behavior, and dissociative symptoms); *id.* at 689 (symptoms of personality disorders can include markedly abnormal perception and interpretation of other people and events, inappropriate emotional responses, and difficulty with impulse control).

[4] *Death Penalty and People with Mental Illness*, NMHA ISSUE BRIEF, *available at* http://www.nmha.org/position/deathpenalty/adultsissuebrief.cfm; *see Atkins*, 536 U.S. at 319-20.

B. The Proper Inquiry is Whether the Mitigating Evidence Can Be Given Effect Under the Texas Special Issues.

These principles do not compel resentencing in every case that lacks a separate question explaining how the jury can consider and give effect to all relevant mitigating evidence. Instead, the proper test is whether the jury can consider the defendant's particular mitigating evidence fully in answering the pre-1991 Texas special issues: whether the defendant committed the crime deliberately and with the reasonable expectation that death would result (the "deliberateness" question); and whether it is probable that the defendant would commit violent criminal acts posing a continuing threat to society (the "future dangerousness" question).[5]

This Court has addressed the constitutionality of the pre-1991 Texas death penalty statute on several occasions. In *Jurek*, the Court concluded that the future dangerousness question gave the jury an adequate vehicle for considering good reputation evidence of the defendant's steady employment and contribution to the support of his family. *Jurek*, 428 U.S. at 267, 272. In *Franklin v. Lynaugh*, 487 U.S. 164, 177-78 (1988), the Court held that the jury could give effect to the defendant's mitigating evidence of good behavior in prison by answering "no" to the future dangerousness question. And in *Johnson v. Texas*, 509 U.S.

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[5] *See Penry I*, 492 U.S. at 318-20; TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(b)(1)-(2) (Vernon 1981 and Supp. 1989). When raised by the evidence, a third special issue on provocation was submitted in some cases. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(b)(3) (Vernon 1981 & Supp. 1989). This third special issue is no longer given in cases in which the offense was committed after September 1, 1991, but is still given, when applicable, in cases where the offense was committed before that date. *Compare id.* art. 37.071 § 2(b)(1)-(2) (Vernon Supp. 2002) *with id.* art. 37.0711 § 3(b)(1)-(3) (Vernon Supp. 2002).

350, 368 (1993), the Court held that the future dangerousness question allowed the jury to give effect to the defendant's youth as a mitigating factor.

On the other hand, *Penry I* holds that in cases where "the jury [is] unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues," it must be separately instructed that it can give mitigating effect to that evidence in imposing sentence. 492 U.S. at 320-21. To establish the need for a separate instruction, the jury need not have been completely precluded from considering the defendant's mitigating evidence. *See Johnson*, 509 U.S. at 386 (O'Connor, J., dissenting). In fact, in *Penry I* the Court specifically noted that the defendant's evidence of mental retardation and childhood abuse did have some relevance to the deliberateness question. *Penry I*, 492 U.S. at 322. Yet because his mitigating evidence also was relevant beyond the scope of the special issues, this Court held that the Eighth and Fourteenth Amendments compelled a remand for resentencing. *Id.* at 322, 328.

In sum, if the two Texas special issues do not allow a jury to give meaningful consideration and full effect to a particular piece of mitigating evidence, a separate mitigating instruction is required. The cases just discussed, which the Court has noted are not in conflict, *Johnson*, 509 U.S. at 365, provide some guidance regarding the application of this test. The Court has not yet defined particular classes of mitigating evidence that do require a separate instruction, however.

C. Mental Disability Evidence Generally Cannot Be Given Effect Under the Pre-1991 Special Issues.

The Fifth Circuit test is not crafted to capture all relevant classes of mitigating evidence. Instead, the Fifth Circuit simply has limited *Penry I* to its facts. *See Robertson v. Cockrell*, 325 F.3d at 244 ("Because Robertson's evidence – in quality and quantity – does not match Penry's, this court concludes that the statutorily prescribed Texas special issues

allowed Robertson's jury to give mitigating effect to his proffered evidence * * *"); *Smith*, 311 F.3d at 680 ("On the issue of whether the defendant has a 'uniquely severe permanent handicap', this court has limited *Penry I* to the facts of that case * * *"). Only if the defendant offers evidence of severe mental retardation combined with extreme childhood abuse will the Fifth Circuit require a separate mitigating evidence instruction. *Robertson*, 325 F.3d at 251; *Smith*, 311 F.3d at 680. As a result, one recent case calculated that out of 47 defendants seeking relief for failure to give adequate mitigating instructions in the 14 years following *Penry I*, the Fifth Circuit granted only one resentencing hearing – to a defendant whose evidence was indistinguishable from Penry's. *Robertson*, 325 F.3d at 256; *see Blue v. Cockrell*, 298 F.3d 318, 321 (5th Cir. 2002).

The Fifth Circuit's stringent approach is too narrow. It excludes groups of defendants whose mitigating evidence cannot be fully considered and given effect by the jury under the two special issues, but who are unable to satisfy the Circuit's two-prong threshold test. The defendants who fall in this hole created by the Fifth Circuit's interpretation of *Penry I* are primarily those with mental disabilities, including those with limited mental development (*e.g.*, low I.Q.), as well as those with mental illnesses and other psychological disorders that impair their thought processes.[6] Evidence of

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[6] *See, e.g., Hernandez v. Johnson*, 248 F.3d 344 (5th Cir. 2001) (schizophrenia and childhood abuse); *Robison v. Johnson*, 151 F.3d 256 (5th Cir. 1998) (schizophrenia); *Lucas v. Johnson*, 132 F.3d 1069 (5th Cir. 1998) (schizophrenia, psychosis, and abuse); *Harris v. Johnson*, 81 F.3d 535 (5th Cir. 1996) (low intelligence); *Lackey v. Scott*, 28 F.3d 486 (5th Cir. 1994) (low intelligence and abuse); *Davis v. Scott*, 51 F.3d 457 (5th Cir. 1995) (personality disorder and abuse); *Madden v. Collins*, 18 F.3d 304 (5th Cir. 1994) (personality disorder); *Demouchette v. Collins*, 972 F.2d 651 (5th Cir. 1992) (personality disorder); *but see Bigby v. Cockrell*, 340 F.3d 259 (5th Cir. 2003) (schizophrenia evidence meeting two-prong test). For a comparison of limited mental development with

(cont'd)

such mental disabilities, particularly in conjunction with the conditions that contribute to them, such as childhood abuse, generally has a mitigating impact that is not captured by the two special issues. There are a number of factors that contribute to this gap in the statutory sentencing scheme.

1. Mental Disability Evidence Has an Aggravating Effect on the Future Dangerousness Question.

The future dangerousness special issue does not give the jury a vehicle for concluding that mental disability evidence mitigates a defendant's personal culpability. In fact, the future dangerousness issue has little to do with the question of culpability at all. Rather, it asks the jury to make a utilitarian calculation about whether the defendant presents a continuing threat of sufficient magnitude that society as a whole will be better off if it ends his life. This calculation requires the jury to consider whether or not the defendant's crime was the product of a temporary lapse in judgment representing a departure from his normal or expected future behavior, considering facts such as: prior criminal conduct; age; temporarily extreme mental or emotional pressure (including duress or domination); and subsequent good behavior. *See, e.g., Johnson*, 509 U.S. at 363; *Franklin*, 487 U.S. at 177-78. Evidence that a mental disability makes the defendant *less* able than a normal adult to control his impulses or to evaluate the consequences of his conduct cannot be given any mitigating effect, much less full mitigating effect, in the context of this inquiry.

Furthermore, evidence of difficulty controlling impulses or evaluating consequences acts at least in part as an

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mental illness, see James W. Ellis and Ruth W. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 423-25 (1985).

aggravating factor by suggesting a "yes" answer to the future dangerousness special issue. *Penry I*, 492 U.S. at 322-24. This effect is only enhanced by the considerable public misunderstanding concerning the relationship between violent crime and mental disabilities. In general, mental disabilities make an individual no more likely or only slightly more likely to commit a crime of violence, and even this risk can drop with appropriate medication.[7] Nevertheless, the public continues to perceive the mentally disabled as violent and dangerous.[8]

The narrow focus of the Texas special issues on future dangerousness tends to play into this prejudice by straight-jacketing the defendant's presentation of his mitigating evidence within the jury's preconceived notion of mental disability. Moreover, the reality of the punishment phase of a capital murder trial, in which the jury has already concluded that the defendant has committed a heinous murder, tends to confirm jurors' views of a link between violence and mental disability even before the punishment phase begins. In the absence of a mitigating evidence special issue, there is a grave risk that the jury will view the defendant's evidence of a mental disability primarily as an aggravator and not as a

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[7] David Pilgrim & Anne Rogers, *Mental Disorder and Violence: An Empirical Picture in Context*, 12 J. MENTAL HEALTH 7, 7-10 (2003); Dep't of Health & Human Servs., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 7 [hereinafter SURGEON GENERAL'S REPORT].

[8] M. Clements, *What We Say About Mental Illness*, PARADE MAGAZINE, Oct. 31, 1993, at 3-6 (over 57% of Americans think mentally ill people are more likely to commit acts of violence than other people); *NMHA Poll Shows Myths and Misunderstanding Still Surround Mental Illness*, NMHA NEWS RELEASE, June 5, 1999, *available at* http://www.nmha.org/newsroom/system/ news.main.cfm ("43% believe that people with mental illness are more violent than the general population"); SURGEON GENERAL'S REPORT, *supra* note 7, at 6-9 (noting that public stigma concerning mental illness appears to be linked to concerns over violence).

mitigating factor that should weigh against the imposition of a capital sentence.

Another troubling consideration is that jurors will likely give particular weight to this questionable aggravating impulse because it concerns future dangerousness. The probability that a defendant will pose a threat to others in the future is a highly aggravating factor and one of the primary determinants of capital-sentencing outcomes. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559-1560 (1998). In jury deliberations, aggravating evidence of future dangerousness takes precedence over any mitigating evidence, including evidence of mental illness or the defendant's intelligence.[9] By contrast, lack of future dangerousness has only a minor mitigating role. *Id.* at 1560. By drawing attention to a factor that already strongly disposes many jurors toward the imposition of a death sentence, the structure of the pre-1991 Texas sentencing statute helps to eclipse mitigating evidence that is of uncertain relevance to the future dangerousness inquiry or that even suggests enhanced dangerousness. Absent a separate mitigating evidence special issue, the Texas sentencing scheme provides little in the way of a safety valve to ensure consideration of the mitigating aspects of mental disability evidence in death-penalty cases.

Finally, because there is often scientific disagreement about the diagnosis of a particular constellation of symptoms and the severity of a defendant's mental disability, it is even more likely that mitigating disability evidence will be obscured by the focus on future dangerousness. For

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[9] John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 404 (2001).

example, the results of I.Q. tests can vary.[10] Another example is anti-social or asocial personality disorder, a condition that has been recognized in the medical literature for over a century, but which has consistently eluded a precise definition.[11]

In light of this scientific uncertainty, it is not unusual for the prosecution and the defense to put on conflicting expert witnesses in the punishment phase of a capital murder trial.[12] The only point of intersection in the clinical opinions of the experts may be that the defendant could be dangerous in the future. Thus, while the jury may be certain that the defendant will be dangerous, it may also be faced with conflicting expert testimony regarding the severity and effects of the defendant's mental disability, as well as the relationship of that disability to the crime. When confronted by a question specifically addressing future dangerousness without a countervailing mitigating evidence issue, the jury probably will be uncertain about how to apply evidence that the defendant likely poses a continuing threat in the future, but also suffers from a mental disability making him less culpable for his crime. As a result, the jury will be unable to

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[10] American Association on Mental Retardation, DEFINITION OF MENTAL RETARDATION, July 29, 2002, *available at* http://www.aamr.-org/Policies/faq_mental_retardation.shtml; Lyndsey Sloan, *Evolving Standards of Decency: The Evolution of a National Consensus Granting the Mentally Retarded Sanctuary*, 31 CAP. U. L. REV. 351, 364 (2003).

[11] Aubrey Lewis, *Psychopathic Personality: A Most Elusive Category*, 4 PSYCHOLOGICAL MEDICINE 133-140 (1974), *reprinted in* CRIMINAL JUSTICE AND THE MENTALLY DISORDERED at 465 (Jill Peay ed., 1998).

[12] *See, e.g.*, *Atkins*, 536 U.S. at 309; *Penry I*, 492 U.S. at 309; *Robison v. Johnson*, 151 F.3d 256, 264 (5th Cir. 1998); *cf.* Raymond Bonner & Sara Rimer, *Mentally Retarded Man Facing Texas Execution Draws Wide Attention*, N.Y. TIMES, Nov. 12, 2000, at § 1, at 34 (recounting an interview with the prosecutor who tried Penry's case in which the prosecutor stated his belief that Penry was not retarded and had not been abused).

give full mitigating effect to a defendant's mental disability evidence under the future dangerousness issue.

2. The Deliberateness Question is Underinclusive and Vague.

The other Texas special issue asks whether the defendant acted deliberately. Unlike future dangerousness, this question does have some relevance to the concept of culpability. Nevertheless, the deliberateness question does not provide the jury with an opportunity to give full mitigating effect to mental disability evidence.

One reason is that "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" *Penry I*, 492 U.S. at 322. Thus, a reasonable juror could conclude that a defendant murdered his victim deliberately, while also concluding that the defendant had a mental disability that made his conduct less morally culpable than defendants who did not have that excuse. *Id.*; *see* Part I.A., *supra* (discussing relevance of various disabilities and contributing factors to culpability). Under these circumstances, however, the deliberateness issue would give the juror no vehicle for expressing her reasoned moral response that the defendant's disability diminished his culpability and made imposition of the death penalty unwarranted. *Penry I*, 492 U.S. at 323. Because the mitigating evidence of mental disability is relevant beyond the scope of the deliberateness issue, a separate mitigating evidence question is required.

A second reason that the deliberateness issue does not allow for full consideration of mitigating evidence is that it is vague. Texas juries are not instructed about what the term "deliberately" means. *Id.* at 322. Because that term is not defined in a way that clearly directs the jury to consider fully a defendant's mental disability evidence as it bears on his personal culpability, courts cannot be sure that the jury is

able to give full effect to that evidence. *Id.* at 323. A separate mitigating evidence question is therefore required.

* * *

The aggregate impact of the foregoing factors can narrowly constrain or even eliminate the jury's ability to give mitigating effect to a defendant's mental disability evidence while almost compelling an affirmative answer to the future dangerousness special issue. Thus, a jury generally will need a separate mitigating evidence question to enable it to give full mitigating effect to mental disability evidence.

In these cases, each Petitioner presented mental disability evidence of his low I.Q. *Smith*, 311 F.3d at 681-83; *Tennard*, 284 F.3d at 596-97. For the reasons explained above, this evidence is relevant to their moral culpability and cannot be given effect under the pre-1991 special issues. Under *Penry I*, therefore, a remand for resentencing is required.

II. THE FIFTH CIRCUIT TEST IS CONSTITUTIONALLY FLAWED.

The Fifth Circuit concluded, however, that no separate mitigating evidence question was required because the Petitioners' evidence did not meet its two-part threshold test of "constitutional relevance." The Court should take this opportunity to make clear that the Fifth Circuit test is improper. That test impermissibly strays from the Court's inquiry in *Penry I* and *II* regarding whether the evidence can be given full mitigating effect under the existing special issues. The test suffers from several other flaws as well: its "handicap" and "nexus" requirements are contrary to this Court's cases; it misuses harmless error principles and usurps the jury's role; and it bucks the trend among the States toward separate mitigating evidence instructions.

A. The Fifth Circuit Has Strayed From the *Penry* Inquiry.

The principal error of the Fifth Circuit test is that it is not designed to answer the question prescribed by *Penry I*: whether the jury can give full effect to mitigating evidence concerning the defendant's moral culpability when answering the two Texas special issues. Instead, having decided to confine *Penry I* to its facts, the Fifth Circuit crafted narrow handicap and nexus requirements designed to capture only evidence similar to that offered by Penry himself. *Robertson*, 325 F.3d at 251-52. This approach suffers from a basic conceptual flaw: it depends on the assumption that evidence similar to Penry's is the only type of evidence that cannot be given effect under the two special issues.

That assumption is flatly wrong. As only one example, the discussion above shows that mitigating evidence of mental disabilities and the factors that contribute to them generally cannot be given effect under the special issues. Because the Fifth Circuit test disregards such mitigating evidence, labeling it "constitutionally irrelevant" even though it cannot be given effect under the special issues, the test should be disapproved.

The Fifth Circuit's suggestions to the contrary notwithstanding, its test has never been adopted by this Court. *Cf. Robertson*, 325 F.3d at 255-56. In *Graham v. Collins*, 506 U.S. 461 (1993), and *Johnson v. Texas*, 509 U.S. 350 (1993), this Court ignored the Fifth Circuit test and instead examined whether the particular mitigating factor at issue was sufficiently addressed by the Texas special issues, reaffirming the basic test of *Penry I*. This Court's precedents neither require nor permit the additional threshold test invented by the Fifth Circuit.

The implications of the Fifth Circuit test are troubling, and confirm the conclusion that the test should be discarded. This is so especially from the perspective of a charge error

analysis. In essence, the Fifth Circuit test holds that even if a defendant's mitigating evidence cannot be given effect under the two special issues, the failure to submit a separate mitigating evidence question is not harmful error if that evidence is "constitutionally irrelevant" under its two-prong test. In other words, the Fifth Circuit's position is that a defendant's mitigating evidence is irrelevant and insufficient to support a "yes" answer to the question whether mitigating evidence warrants a sentence of life imprisonment rather than death unless that evidence meets the nexus and harm requirements. Given this Court's broad view of the types of evidence that are relevant to assessing the defendant's moral culpability, however, that position cannot be correct. *See* Part I.A., *supra*.

Moreover, the Texas trial court in *Smith* concluded that sufficient evidence had been offered to require a separate mitigating evidence instruction, and the Fifth Circuit should have respected that conclusion. Between this Court's 1989 decision in *Penry I* and the change of Texas law in 1991, the Texas Court of Criminal Appeals routinely measured a defendant's mitigation evidence against the facts of *Penry I* in order to determine whether the defendant was entitled to a separate instruction.[13] Thus, Texas courts applied a standard similar to the Fifth Circuit's narrow rule, rarely overruling a trial court's determination that a separate mitigation instruction was unnecessary. Yet when the Texas trial court

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[13] *See Ex Parte Ellis*, 810 S.W.2d 208, 212 (Tex. Crim. App. 1991) ("We conclude * * * that the mitigating evidence in this cause does not rise to the level of '*Penry* evidence' and no additional instruction was necessary for the jury to consider and give effect to this evidence."); *Ex Parte Baldree*, 810 S.W.2d 213, 217 (Tex. Crim. App. 1991) (rejecting that evidence of defendant's good character and kindness towards others required a separate mitigation instruction); *Black v. Texas*, 816 S.W.2d 350, 365 (Tex. Crim. App. 1991) ("After once again reviewing the evidence presented by appellant during punishment, we conclude that this mitigating evidence is qualitatively different from that in *Penry*.").

applied this standard to Smith's mitigating evidence, it decided to instruct the jury separately to take that evidence into account. Under AEDPA, the Fifth Circuit should have deferred to the state court's finding that the defendant presented relevant mitigating evidence requiring a separate instruction. 28 U.S.C. § 2254(d), (e). Because the instruction Smith received was defective under this Court's decision in *Penry II*, the Fifth Circuit should have granted him a new sentencing hearing under a correct instruction. Instead, it second-guessed the trial judge's conclusion about the sufficiency of the evidence, making its own evidentiary ruling that Smith's evidence was not sufficiently *Penry*-like. *Smith*, 311 F.3d at 680. That outcome is improper.

It should also be noted that Texas law has now been changed to require a mitigating evidence question to be given in all cases. This question carves out nothing as constitutionally irrelevant: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that the sentence of life imprisonment rather than a death sentence be imposed." TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(e) (Vernon Supp. 2002). Under the Fifth Circuit test, this statute is arguably unconstitutional because it gives the jury a vehicle to consider "constitutionally irrelevant" mitigating evidence that does not concern a uniquely severe permanent handicap or have a nexus to the crime. Yet that conclusion would be contrary to this Court's precedent, which recognizes that the new Texas statute appropriately ensures that "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant * * *." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). For this additional reason, the Fifth Circuit test should be disapproved.

B. Evidence of a Uniquely Severe Permanent Handicap With a Nexus to the Crime Is Not Required.

Not only is the Fifth Circuit's threshold test inconsistent with *Penry I*, but the two components of that test have constitutional flaws of their own. The Fifth Circuit conditions the constitutional right to have a jury provide a reasoned moral response to mitigation evidence on whether that evidence demonstrates a uniquely severe permanent handicap and a nexus to the crime. In *Smith*, the Fifth Circuit found that the defendant's low I.Q. is not mitigating evidence because it is not a "uniquely severe permanent handicap." 311 F.3d at 682. In *Tennard*, the Fifth Circuit concluded that the defendant's evidence of his low I.Q. is not mitigating because "he failed to introduce at trial any evidence indicating that the capital murder was in any way attributable to his I.Q. of 67." 284 F.3d at 597. Neither of these requirements can be sustained under this Court's precedent.

1. Uniquely Severe Permanent Handicap

The first prong of the Fifth Circuit's "constitutional relevance" test requires a defendant to show a "uniquely severe permanent handicap[] with which [he] was burdened through no fault of his own." Smith, 311 F.3d at 680 (quoting *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995)). The severity, permanence, and harm aspects of this handicap requirement are all flawed.

Severe: As the Fifth Circuit explains its handicap requirement, "we have found a *Penry I* problem to exist only where the petitioner presents mitigating evidence relating to either *severe* mental retardation or to *extreme* childhood abuse." *Smith*, 311 F.3d at 680 (emphasis added). Yet in *Penry I*, during the guilt/innocence phase of Penry's trial, evidence was presented that characterized Penry's mental state as anywhere from "mildly retarded" or "extremely limited mental ability" to an "anti-social personality." *Penry I*, 492 U.S. at 308-310. Nowhere did the Court characterize

Penry's mental retardation as "severe," nor his childhood abuse as "extreme."

The Fifth Circuit's requirement of a uniquely severe permanent handicap requires courts to ignore the jury's inability to give effect to mitigating mental disability evidence where that evidence is less than "severe." The inadequacy of this excessively restrictive reading of *Penry I* is apparent in light of this Court's recent decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* holds that the Eighth Amendment prohibits execution of the mentally retarded. Yet the Fifth Circuit reads *Penry I* as requiring an additional instruction on mitigating evidence only when that evidence includes severe mental retardation. *Robertson*, 325 F.3d at 251; *Smith*, 311 F.3d at 682 ("This court has repeatedly held that neither evidence of low I.Q. nor evidence of borderline retardation is sufficient to warrant a Penry instruction."). Therefore, under the Fifth Circuit's approach, the only defendants entitled to an additional instruction under the pre-1991 Texas death penalty statute are those who no longer need it. In essence, the Fifth Circuit has narrowed the scope of *Penry I* past the point that it vanishes into *Atkins* and loses any independent significance. This surely cannot be the rule.

The Fifth Circuit's "severe" handicap requirement also inappropriately discounts the role that childhood abuse may have on a defendant's state of mind and moral culpability. The link between childhood abuse and mental disability is not only well documented in the medical literature, but, as this Court has noted, intuitively obvious. *Santosky v. Kramer*, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting) ("It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens."); Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1156, 1158 (1999).

By limiting *Penry I* to the particularly horrific circumstances of Penry's upbringing, the Fifth Circuit has ignored the fact that a multitude of factors beyond the severity of abuse can affect the degree of mental impairment an individual who is victimized as a child may suffer as an adult. *Id.* Other factors, such as individual susceptibility, whether the abuse is perpetrated by a caretaker, and the presence of other psychological, neurological, or cognitive disabilities may enhance the deleterious effects of childhood abuse. *Id.* at 1159-1160. The availability of external support facilities, intervention, and treatment may also significantly influence the degree of psychological trauma caused by childhood abuse. *Id.* at 1161. The trauma caused by childhood abuse, and the concomitant reduction in a capital murder defendant's moral culpability caused by this trauma, is not solely dependent on the severity of the abuse as the Fifth Circuit test restrictively holds.

Permanent: Turning to the "permanent" aspect of the handicap requirement, this qualification on the constitutional mandate of *Penry I* is contrary to this Court's jurisprudence on executing the mentally insane. Although mental insanity can be controlled with the use of medication, in *Ford v. Wainwright*, 477 U.S. at 409-410, this Court acknowledged that the Eighth Amendment prohibition against sentencing a defendant who is insane to death aims "to protect the dignity of society itself from the barbarity of exacting mindless vengeance." This Court did not rely on whether the mental illness was permanent or presented a nexus to the crime, but instead reasoned that sentencing the mentally insane to death "offends humanity" and offers no deterrent, retributive, or religious benefit. *Id.* at 407-08. The Fifth Circuit's permanency test, in essence, impermissibly asks whether a mentally ill defendant can be treated in order to be sentenced to death.

Even when a defendant's mitigating evidence of untreated mental illness does not rise to the level of insanity,

the availability of treatment may actually prevent him from obtaining a mitigating evidence special issue. In *Robison v. Johnson*, 151 F.3d 256, 265-66 (5th Cir. 1998), for example, the Fifth Circuit concluded that because the defendant's schizophrenia was in remission and could be controlled with medication in the structured environment of prison, the jury could give mitigating effect to evidence of the defendant's mental health problems under the future dangerousness special issue. Yet this analysis ignores a significant aspect of the mitigating value this type of mental disability evidence possesses. The moral culpability of a defendant whose mental illness was not under control at the time of his crime will be reduced even though the possibility of treatment may also reduce his dangerousness in the future. This moral relevance distinguishes mental disability evidence from the mitigating evidence presented in *Franklin* and *Jurek*. Franklin's ability to live in the structured environment of prison and Jurek's good character evidence had no relevance to their moral culpability for their crimes. The mitigating evidence in those cases was relevant only because of its relationship to the defendants' future dangerousness. The Fifth Circuit's willingness to ignore the implications of a defendant's mental disability to his moral culpability is inconsistent with this Court's holding that a defendant's individual moral culpability is the sine qua non of the punishment phase inquiry.[14]

[14] *See Penry I*, 492 U.S. at 319; *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (holding that "victim impact" evidence could be introduced during the punishment phase of a capital murder trial in order to allow the jury to fully consider all of the circumstances affecting the defendant's culpability); *Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (noting that the jury's sentencing determination should be based on its "reasoned moral response to the defendant's background, character, and crime").

Fault: Finally, by requiring that the criminal act be related to a "uniquely severe permanent handicap[] with which the defendant was burdened through no fault of its own," *Smith*, 311 F.3d at 680, the Fifth Circuit has conflated the sentencing phase of the trial with the guilt phase. Because "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question," capital murder trials are bifurcated. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). Criminal evidence and mitigation evidence are different. Although it is important to establish a nexus between the crime and evidence presented during the guilt phase of a capital murder trial, during the sentencing phase, mitigation evidence is important if it informs the jury's determination of the defendant's moral culpability.

The Fifth Circuit test so narrowly confines the entitlement to a mitigation instruction as practically to eliminate it. In effect, no mitigation question is required unless the mitigating evidence rises to the level of justification or excuse: an act that is "wholly"[1] attributable to a condition that burdens a defendant through "no fault" of his own is an excuse, like insanity or automatism. Yet it is hornbook law that excuse and mitigation are distinct legal concepts, serving entirely different functions. An excuse, like a justification, is considered in determining guilt or innocence. By contrast, mitigating factors are pertinent to determining whether a guilty defendant is nonetheless entitled to leniency.[15] By requiring mitigation instructions

[15] *See Spivey v. Zant*, 661 F.2d 464, 471 n.8 (5th Cir. 1981) (recognizing distinction of culpability from guilt or innocence and noting the relevance of circumstances "which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment") (citing *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977)); *see also* Phyllis

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only where the supporting evidence would suffice to establish a legal excuse, the Fifth Circuit's standard conflicts not only with these fundamental principles, but with the mandate of *Penry I*.

2. Nexus to the Crime

The second prong of the Fifth Circuit's test shifts the constitutional focus this Court placed on the defendant's culpability and misapplies *Penry I* to require "a nexus between the severe permanent condition * * * and the capital murder." *Tennard*, 284 F.3d at 597. As a practical matter, this nexus inquiry is flawed because the Fifth Circuit has not considered whether it is even possible for the scientific community to establish a direct link between crime and mitigating evidence of mental disabilities. *See* pp. 12-13, *supra*. Moreover, the nexus requirement is contrary to this Court's precedent.

This Court does not require the defendant to show a nexus between his mitigating evidence and the *crime*.[16] *See Eddings v. Oklahoma*, 455 U.S. at 115 (Court did not examine nexus between crime and mitigating evidence of youth, childhood abuse, and emotional problems before holding that sentencer was required to consider that

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L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 73, 75 (1997) (Fifth Circuit test conflates culpability and responsibility by restricting evidence in guilt phase to that which lessens culpability and requiring nexus between evidence of mental disability and commission of crime).

[16] Interestingly, the Sentencing Commission and federal courts have rejected a nexus requirement in the non-capital sentencing context, permitting a reduced sentence based on evidence of "reduced mental capacity" that does not have a direct causal link to the crime. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13; *United States v. Cockett*, 330 F.3d 706, 713-14 (6th Cir. 2003).

evidence). Instead, the relevant connection is between the defendant's mitigating evidence and his *culpability*. As *Penry I* shows, the concept of culpability is not limited to the circumstances of the crime itself. "[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record *or* the circumstances of the offense." *Penry I*, 492 U.S. at 327-28 (emphasis added). In fact, allowing the jury to give effect "only [to] mitigating evidence about the circumstances of the *crime*, and not evidence about the defendant's background and character," would be inconsistent with the "obligation to consider all of the mitigating evidence introduced by the [defendant]." *California v. Brown*, 479 U.S. at 842 (O'Connor, J., concurring).

In *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), the Court rejected the Fifth Circuit's narrow view of *Penry I*. The defendant in *Wiggins*, who was not mentally retarded, did have a history of childhood abuse that his attorneys failed to discover and present to the jury. Speaking for the Court, Justice O'Connor held this evidence of abuse was sufficiently important that the attorneys' omission amounted to ineffective assistance of counsel. *Id.* at 2533. The Court described the abuse as "powerful" mitigating evidence. *Id.* After reciting Wiggins' childhood abuse and rotten social background, the Court concluded that "Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Id.* at 2542 (citing *Penry I*, 492 U.S. at 319; *Eddings*, 455 U.S. at 112; and *Lockett*, 438 U.S. at 604); *see also* Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327, 340-342 (2002) (arguing that a defendant has a constitutionally protected right to present mitigating evidence of "rotten social background" and mental retardation). Thus, the Court did not interpret its language of "attribution" in

Penry I as requiring a nexus between the crime and the mitigating evidence. Rather, it focused on the relevance of the evidence to the defendant's moral culpability. This Court should disapprove the Fifth Circuit's "nexus" requirement.

C. The Fifth Circuit Test Misuses Harmless Error Principles and Usurps the Jury's Role.

Another constitutional infirmity of the Fifth Circuit test is that its purpose is to determine which *Penry I* errors are harmless. Even in circumstances where the jury instructions do not provide a vehicle for giving effect to the defendant's mitigating evidence, a remand for resentencing can be avoided if the Fifth Circuit test labels that evidence "constitutionally irrelevant."

This practice is impermissible. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor," neither may the court. *Penry I*, 492 U.S. at 318 (quoting *Eddings*, 455 U.S. at 113-14). "If mitigating evidence is relevant to the sentencing determination, a defendant has a right to have the jury consider it *even if an appellate court may question its weight*." *Franklin v. Lynaugh*, 487 U.S. at 191 (Stevens, J., dissenting) (emphasis added). Moreover, even if the Fifth Circuit insists on posing as the sentencer, this Court cautions that the sentencer is precluded from "refus[ing] to consider, *as a matter of law*, any relevant mitigating evidence." *Penry I*, 492 U.S. at 318.

Under *Penry I*, if the instructions do not allow the jury to consider and give effect to all mitigating evidence, an error occurs and remand for resentencing is compelled "so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id.* at 328 (quoting *Lockett*, 438 U.S. at 605); *see also Eddings*, 455 U.S. at 119 (O'Connor, J., concurring) (remand required "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the [jury]"). "When the choice is between life and death, that risk is

unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry I*, 492 U.S. at 328 (quoting *Lockett*, 438 U.S. at 605).

A related flaw in the Fifth Circuit test is that it impermissibly narrows the breadth of evidence that *Penry I* instructs must be within a sentencing jury's reach. To analyze constitutional infirmities under this Court's holdings in *Penry I* and *II*, appellate courts need only determine whether the sentencing instructions given in a capital case provided an adequate vehicle for the jury to make a reasoned moral response to the defendant's mitigating evidence. It is the province of the jury in the first instance, not of a trial or appellate judge, to weigh the aggravating and mitigating factors that determine the imposition of the death penalty. *Ring v. Arizona*, 536 U.S. 584 (2002). As this Court held in *Eddings*, when the sentencer does not consider all relevant mitigating evidence, the proper remedy is to remand and allow it "to consider * * * and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for [it]." 455 U.S. at 117. Using the Fifth Circuit test to filter out "constitutionally irrelevant" evidence that the jury need not be instructed to consider dissolves the rights of capital defendants to have juries evaluate all evidence that mitigates against a death sentence.

D. The Fifth Circuit Test Bucks the Trend Toward Separate Instructions on Mitigating Evidence.

While the Fifth Circuit has been restricting the availability of a separate mitigation instruction under *Penry I*, the States have been moving in the opposite direction. In response to *Penry I*, the Texas Legislature amended the death penalty statute to pose a separate catch-all question on mitigation to the jury in every case. *See* TEX. CRIM. PROC.

CODE ANN. art. 37.071 § 2(e) (Vernon Supp. 2002).[17] Texas thus joined the long-standing practice in other States of permitting capital sentencing juries to consider any mitigating evidence they deem relevant.[18] Many States explicitly mention mental disability evidence as a relevant mitigating factor that jurors may consider.[19] Federal statutes

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[17] September 1, 1991, is the effective date of this amendment. TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon Supp. 2002). The 1991 amendment is applicable in all cases where the offense was committed after September 1, 1991. *Id.* at § 2(i). A subsequent enactment, effective September 1, 1993, was made applicable to all capital cases where the offense was committed before September 1, 1991. TEX. CRIM. PROC. CODE ANN. art. 37.0711 § 1 (Vernon Supp. 2002).

[18] "[C]urrent state sentencing schemes generally offer two vehicles for the consideration of mitigation evidence: a list of enumerated mitigating circumstances and a 'catch-all' phrase or its functional equivalent permitting the sentencer to consider all other potentially mitigating factors." Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 848 & n.65 (1992). Many of these schemes are based on the Model Penal Code's death penalty statute, which lists certain aggravating and mitigating factors but also allows the jury to consider "any other facts that it deems relevant." MODEL PENAL CODE § 210.6(2) (1985); *see* Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1209 & n.56 (2000).

In addition to Texas, there are at least six State statutes that contain only a "catch-all" phrase for mitigating evidence: DEL. CODE ANN. tit. 11, § 4209(c); GA. CODE ANN. § 17-10-30(b); IDAHO CODE § 19-2515(3)(b); NEV. REV. STAT. ANN. 200.035(7); OKLA. STAT. ANN. tit. 21, § 701.10(C); S.D. CODIFIED LAWS § 23A-27A-2(4).

[19] The recently-amended Illinois statute mentions mental or emotional disturbance, emotional or physical abuse, and reduced mental capacity as mitigating factors. 720 ILL. COMP. STAT. 5/9-1(c)(2), (6), (7), *as amended by* 2003 Ill. Legis. Serv. P.A. 93-605. Several other State statutes specifically mention mental development defects or mental illnesses as mitigating factors. *E.g.*, KY. REV. STAT. ANN. § 532.025(2)(b) ("the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation * * * [even though the impairment] is insufficient to constitute a defense to the crime"); N.Y. CRIM. PROC. LAW

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and sentencing guidelines, as well as the laws of other countries, also take the mitigating effect of mental disabilities into account.[20] This legislative judgment is important

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§ 400.27(9)(b) ("Mitigating factors shall include * * * the defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law impaired but not so impaired in either case as to constitute a defense to prosecution."); OHIO REV. CODE ANN. § 2929.04(B)(3) ("[w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law.").

Many other State statutes refer more generally to the mitigating effect of "mental disturbance" evidence. *E.g.*, ARK. CODE. ANN. § 5-4-605; CAL. PENAL CODE § 190.3 ("mental condition" as well as "whether or not the defendant was under the influence of extreme mental or emotional disturbance"); FLA. STAT. ANN. § 921.141(6); KAN. STAT. ANN. § 21-4626; LA. CODE CRIM. PROC. ANN. art. 905.5(b); MISS. CODE ANN. § 99-19-101(6)(b); MO. REV. STAT. § 565-032.3(2); MONT. CODE. ANN. § 46-18-304(1)(b); N.H. REV. STAT. ANN. § 630:5 (VI)(a) ("defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired"); N.J. REV. STAT. § 2C:11-3c(5)(a); N.M. STAT. ANN. § 31-20A-6 (C); N.C. GEN. STAT. § 15A-2000(f)(2); 42 PA. CONS. STAT. ANN. § 9711(e)(2); UTAH CODE ANN. § 76-3-207(4)(b); VA. CODE ANN. § 19.2-264.4(B); WYO. STAT. ANN. § 6-2-102(j).

[20] 18 U.S.C. § 3592(a)(1) ("defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge"); 21 U.S.C. § 848(m)(1) (same); U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (downward departure for "significantly reduced mental capacity"). For a discussion of the European system of partially reducing culpability and punishment based on mental disability evidence, see Hans Kröber & Steffen Lau, *Bad or Mad? Personality Disorders and Legal Responsibility – The German System*, 18 BEHAV. SCI. & L. 679, 682-85 (2000), and George E. Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability*, 62 J. CRIM. L. & CRIMINOLOGY 313, 321-24 (1971).

evidence of what the Eighth Amendment requires. *See Atkins*, 536 U.S. at 312, 321.

Despite the changes to the Texas statute, there are still compelling reasons to clarify the law in this area. As the Fifth Circuit noted, in the two years between *Penry I* and the effective date of the amendment in 1991, dozens of Texas capital defendants like Smith were tried with the "nullification" instructions later found inadequate in *Penry II*. *See Robertson v. Cockrell*, 325 F.3d at 249. Tennard and dozens of other defendants with mitigating evidence that could not be given effect through statutory special issues were sentenced, without even a *Penry II* "nullification" instruction, under the instructions found constitutionally inadequate in *Penry I*. By 1994, according to some estimates, *Penry* claims had been rejected by lower state and federal courts in Texas in 100 to 150 cases. Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1, 9 n.53 (1994). These defendants have a literal life-and-death interest in having this Court clarify the circumstances in which a separate mitigation instruction is required.

CONCLUSION

For the foregoing reasons, this Court should reject the Fifth Circuit's two-prong threshold test of "constitutional relevance" and adhere to the *Penry I* rule that a separate mitigating evidence question is required whenever the jury cannot give full effect to a defendant's mitigating evidence under the two Texas special issues. Applying this analysis, the Court should hold that Petitioners' juries could not give full effect to their mental disability evidence, and should reverse and remand these cases for new sentencing hearings.

Respectfully submitted.

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